IN THE HIGH COURT OF BOMBAY AT GOA

MISC. CIVIL APPLICATION NO. 988 OF 2005.
IN
WRIT PETITION NO. 304 OF 2004.

Shri Inacio Fernandes,
Panaji, Goa. ..... Applicant.

Versus

The State of Goa,
Thro' the Chief Secretary
and two others. ..... Respondents.

Shri M.S. Sonak with Shri A.D. Bhobe, Advocates for the Applicant.

Shri Gurudas G. Pai – Original Petitioner in person.

Shri S.R. Rivonkar, Government Advocate for Original Respondent No.1.

Shri V.P. Thali, Advocate for the Original Respondents No.2 and 3.

CORAM: R.M.S. KHANDEPARKAR &
N. A. BRITTO, JJ.

DATE: 22nd FEBRUARY, 2006.

P.C.:

Heard.

2. By the present application the applicant who was the respondent No.4 in PIL W.P. No.304/2004 has sought to relieve himself from the obligation to comply with the portion of the Undertaking dated 27th October, 2005 with regard to:- “Restore the balconies”.

3. The applicant/respondent No.4 in the Writ Petition, had given an Undertaking on 27th October, 2005 to the effect that he would remove the pillars/columns within the front setback of the hotel building and restore the balconies in accordance with the approved plan within a period of 30 days from 25/10/05. It is the contention on behalf of the Applicant that this Court in the said Writ Petition under Judgment and Order dated 25th October, 2005 had directed the Member Secretary, Planning and Development Authority of Goa and Corporation of the City of Panaji to consider the application for regularisation made by the Applicant within the time specified and to place such orders before this Court and further in Misc. Civil Application No.862/05 in the said Writ Petition, order passed on 25th October, 2005 required the applicant to remove the balconies as undertaken in the said Undertaking. At the same time, it is the case of the applicant that liberty was granted to him to approach the Court in case of favourable order from the concerned authorities and that is how the applicant has filed the present application. It is the case of the applicant that the balconies were required to be restored as in the absence thereof there is utilization of area in excess of permitted F.A.R. It is his further case that the front portion of the hotel building is covered by glass curtain or reflective glass cladding by investing a sum of Rs. 7 lakhs. Piece meal uncovering of balconies is not possible and, as such, entire glass curtain or reflective glass cladding will have to be destroyed. It would be impossible

to make use of the entire hotel upon such destruction until the engineering work of high magnitude is undertaken. Since at the time of giving the Undertaking the applicant was advised by the contractor involved in the construction of the building, he was under bona fide impression that dismantling portions of the glass curtain would be possible. However upon contacting the Agency that had actually supplied the glass curtain and had assisted in its installation, it was learnt by the applicant that it is almost impossible to remove the glass curtain piece meal and that the entire glass curtain/reflective glass cladding will have to be destroyed. To avoid such a situation and considering that demolition of six hotel rooms on the fifth floor, as a result of which the total utilized F.A.R. would be 1097 sq.mts., as against the permissible F.A.R. 1100 sq.m., it is now requested by the applicant that he may be discharged from his Undertaking to restore the balconies and instead be permitted to demolish six rooms on the fifth floor of the hotel building to bring the construction within the limits of permissible F.A.R.

4. The application is objected to by the original Petitioner in the Writ Petition on whose complaint the petition came to be registered. He has also placed on record various orders which were passed in the Writ Petition and the Misc. Civil Applications. According to him, grant of the relief asked for would virtually defeat the order dated 25.10.2005 and also will amount

to granting Court's sanction to the illegalities committed by the applicant.

5. It is to be noted that the Order of 25th October, 2005 by which the applicant was directed to file the Undertaking in question, was preceded by certain findings as well as some other directions. The Order dated 25th October, 2005 clearly recorded that :-

> " The first floor that was approved for hall has been changed to hotel rooms and the balconies are covered into rooms."

It was further observed that :-

> " The balconies have been fully covered and converted into rooms ".

While taking note of the deviations, to be prima facie disclosing to be quite gross, serious and substantial, it was also observed that F.A.R. exceeded to 258 whereas approval was granted for F.A.R. on 200, thus F.A.R. exceeded more than 25%. While taking note of the Order dated 26.10.04 by this Court, by which it was made very clear that in case of deviations, action as per Regulation 2000 should be initiated, it was categorically observed that :-

> " Prima facie, we find that some of the deviations do not appear to be tolerable and compoundable."

It was also noted that :-

> "respondent No.4 appears to have grossly breached the building permission as already indicated above and we thought of passing an interim order. However, the learned Senior Counsel for the respondent No.4 submitted that the respondent no.4 was ready and willing to demolish the pillars (columns) constructed in front set back. He also submitted that the balconies which have been covered and converted into rooms by the respondent no.4 shall be restored as per the approved plan. The learned Senior Counsel submitted that removal of pillars from the front setback and restoration of balconies as per approved plan shall take 30 days, and, prayed for the said time. "

After taking note of the said submission by the applicant, it was ruled that :-

> " As regards violation of fire norms and other breaches, we are of the view that these aspects shall be considered after the respondent no.4 removes the pillars from the front setback and restores the balconies as per the approved plan."

After having ruled so, the specific directions which were given were to the effect that :-

(i) 30 days time was granted to the respondent No.4 for removal of pillars/columns and restoration of the balconies as per approved plan dated 1.3.01;

(ii) Direction was issued to the Respondent No.4/applicant herein to file the undertaking within 3 days, removal of pillars/columns and restoration of balconies in accordance with the approved plans;

(iii) The Member Secretary, Planning Development Authority of

Goa and the Corporation of the City of Panaji was directed to pass appropriate order pursuant to the show cause Notice issued to the Respondent No.4 after hearing him within one month from the date of the said Order and the said authorities were required to consider the application for regularisation made by Respondent No.4 within the specified time and place the order before this Court;

(iv) The Respondent No.4 was permitted to file objections to the site inspection report dated 15th February, 2005 within thirty days.

6. Apparently, the Undertaking which was required to be given for restoration of the balconies was not a mere concession made on behalf of the Applicant to secure time or for consideration by the authorities about his application for regularisation filed by the applicant nor it was merely a voluntary act on the part of the applicant nor it related to mere utilization of F.A.R. in excess of permissible one. The Undertaking was allowed to be given after arriving at a specific finding that there has been gross violation of building permission and some of the deviations which are prima facie intolerable and non compoundable. In the background of the said finding, and apprehending the directions to be issued pursuant thereto, the applicant having volunteered himself to remove such violations in relation

to the pillars and the balconies within the time to be granted for the same, that the Court had permitted the applicant to file the said Undertaking. It was not as a result of any adjustment as such based on proposed regularisation of the construction carried out without prior permission nor on a regularisation of intolerable and non compoundable deviations. The Court had shown indulgence in granting time for removal of some of the intolerable and non compoundable deviations and in that connection, the applicant was directed to file Undertaking to the effect that those deviations would be removed within specified time.

7. Undoubtedly it appears that there is an order passed by the North Goa Planning and Development Authority on 21st December, 2005 on an application filed by the applicant. That will have to be dealt with separately. The fact remains that there was a specific direction for the removal of the pillars from the front setback and restoration of the balconies as per the approved plan dated 1.3.01. It is nobody's case that the said Order of this Court passed on 25th October, 2005 has either been reviewed or set aside in any proceeding. Obviously, the order stands even today. By seeking to relieve himself from the obligation under the Undertaking given by the applicant on 27th October, 2005 in Writ Petition No.304/04 the applicant is seeking to wipe out the effect of the Order dated 25th October, 2005. The applicant is not entitled to get any direction which will result in

nullifying the said order. The applicant having been specifically directed in the said order to remove the pillars/columns and to restore the balconies as per the approved plan dated 1.3.01 and there was specific direction to carry out the said work within a particular period i.e. 30 days which is subsequently extended by further Order dated 22.11.05, it was but necessary for the applicant to comply with the said order within the said further period. Evidently the applicant has not complied with the said order. Prima facie, the applicant is already in contempt of Court. Question of relieving the applicant from his obligation under the said Undertaking in such circumstances does not arise. The contention that relieving the applicant from the Undertaking would satisfy the requirement of the permissible F.A.R., is totally devoid of substance. As already observed above, the deviations do not merely violate the provisions regarding permissible F.A.R., but they grossly breach the building permission which are intolerable and non compoundable, besides the fact that it was the applicant himself who had come forward to assure the Court that he will remove the pillars/columns and restore the balconies as per the approved plan dated 1.3.01 within the specified period. The excuse which is now sought to be given is that for the purpose of restoration of balconies, it would require destruction of the entire glass curtain/reflective glass cladding, cannot be accepted. If the applicant had not verified the said eventuality before giving that Undertaking, then the applicant has

himself to blame. Besides merely because the applicant has spent Rs.7 lakhs for erecting such glass cladding, that by itself cannot be justification to condone the illegality in the matter of construction activities more particularly when they violate the provisions of law relating to the construction and such violations are neither tolerable nor compoundable. As already observed above, the order passed by the authorities on application for regularisation as well as the issue pertaining to violation of fire safety norms and other breaches are yet to be considered in relation to the construction in question.

8. In the facts and circumstances of the case, the applicant does not deserve any sympathy.

9. It was also sought to be argued on behalf of the applicant that the application is not solely based on the point that the applicant would incur loss of Rs. 7 lakhs or that the relief of Undertaking would take care of compliance of the rule relating to permissible F.A.R., but that the Town and Country Planning Authority has already regularised the construction. As already observed, the matter relating to the order of regularisation is yet to be considered and the fact remains that by Order dated 25th October, 2005 there was specific finding given by this Court that the construction of the pillars and balconies cannot be tolerated and are

directed to be removed and the applicant himself, having correctly understood the implication of the said order, had given the said Undertaking. Question of authorities acting contrary to the said order of this Court does not arise at all. Regularisation stated to have been granted cannot be contrary to the said Order passed by this Court on 25th October, 2005. Needless to say that any permission granted or regularisation ordered in contravention of Order dated 25th October, 2005 would be ab initio void.

10. For the reasons stated above therefore there is absolutely no case made out for relieving the applicant from the Undertaking given on 27th October, 2005 in relation to the restoration of the balconies. Apparently the applicant has not complied with the said Undertaking till this date nor has complied with the Order dated 25th October, 2005 passed in Writ Petition No. 304/04. Therefore while dismissing the application, it is necessary to issue Notice of contempt to the applicant for non-compliance of the said Order as well as the said Undertaking in terms of the provisions of the Contempt of Courts Act read with Article 215 of the Constitution of India. The applicant is required to show cause as to why he should not be punished for contempt of Court for non-compliance of the directions issued under Order dated 25th October, 2005 in PIL W.P. No.304/04 for restoration of the balconies as per the approved plan dated 1.3.01 as also

for non-compliance of the Undertaking dated 27th October, 2005 in relation to the said restoration of the balconies. The applicant is required to show cause in that regard on 27th March, 2006. Notice in that regard is received by the learned Advocate for the applicant on behalf of the applicant. In addition to the Notice being received on behalf of the applicant, issue notice to the applicant to be served in the hotel premises at Panaji. The contempt proceedings in that regard shall be appended to Misc. Civil Application No.988/05 in W.P. No.304/04.

11. In addition to showing cause to the above Notice, the applicant shall comply with the directions issued under Order dated 25th October, 2005 within a period of 15 days from today. The Administrator of the respondent No.1 and Chief Officer of Panaji Municipal Council the respondent No.3 shall ensure prompt compliance of this direction and shall furnish report of compliance in this Court on 27th March, 2006 without fail.

12. The matter also to be listed on 27.03.2006 for consideration of the Order of regularisation and other points regarding fire safety etc. in terms of the Order dated 25.10.05.

13. At this stage, the learned Advocate for the applicant prays for

stay of the Order. In the facts and circumstances of the case, question of grant of stay does not arise. Hence request for stay is rejected.

R.M.S. KHANDEPARKAR, J.

N. A. BRITTO, J.

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